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No. 01-1139

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2001

STANLEY A. SAMUEL,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

What legal standard applies to determine whether admission of witness statements resulting from government coercion violates a criminal defendant's rights to due process and a fair trial.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Stanley A. Samuel, respectfully requests that the Court issue a writ of certiorari to review the judgment of the Supreme Court of Wisconsin, affirming his judgment of conviction on direct appeal.

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court, *State v. Samuel,* 2002 WI 34, 252 Wis.2d 26, 643 N.W.2d 423, is in Appendix A. Appendix B is the Wisconsin Court of Appeals decision, *State v. Samuel*, 2001 WI App. 25, 240 Wis.2d 756, 623 N.W.2d 565.

Appendix C is the state post-conviction judge's oral ruling affirming exclusion of the witness' statement. Appendix D is that portion of the state trial court's pre-trial decision of November 14, 1997, denying Samuel's motion to suppress the witness' statement.

JURISDICTION

The Wisconsin Supreme Court entered judgment on April 25, 2002. This Court's jurisdiction is invoked under 28 U.S.C. §§1257(a) & 2101(d) and Supreme Court Rule 13.1. As he did below, Mr. Samuel asserts the deprivation of his rights to due process secured by the United States Constitution

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition concerns the construction and application of the Due Process Clause of the Fourteenth Amendment to the United States Constitution which provides:

> No state shall ... deprive any person of life, liberty, or property, without due process of law....

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

On June 11, 1996, the state filed a criminal complaint charging Stanley Samuel with interference with child custody in violation of Wis. Stat. §948.31(2). The charge concerned an incident on January 29, 1996, in which 15-year old Tisha L. left the home of her mother, either because she ran away from home (the state's view) or because she was thrown out (Tisha's view), and then left Wisconsin with Samuel.

On March 8, 1997, Samuel and Tisha were stopped at a roadblock in Phelps County, Missouri. Samuel waived extradition and was returned to Wisconsin for an initial appearance on March 21, 1997. Tisha was returned to Wisconsin where, on March 10, 1997, she gave birth to a daughter.

On March 12, 1997, after Tisha declined to provide any information against Samuel, government agents placed her newborn daughter in a foster home pending Tisha's "cooperation" in the prosecution of Samuel. When Tisha subsequently provided the agents with a statement against

Samuel, her daughter was returned to her on March 14, 1997.

On March 21, 1997, the state filed an amended criminal complainant charging Samuel with interference with child custody, Wis. Stat. §948.31(2), and abduction, Wis. Stat. §948.30(1)(a), both as a repeater, Wis. Stat. §939.62(1). The state filed a second amended complaint on March 24, 1997, adding a charge of second degree sexual assault of a child, Wis. Stat. §948.02(2). The third count concerned the allegation that Samuel and Tisha had sex while in Wisconsin at some point between September 10 and 20, 1995, at a time when Tisha was 15 years old.

At the preliminary examination on April 2, 1997, Tisha testified that, contrary to her statement to the agents, she and Samuel did not have sex prior to leaving Wisconsin. The court nonetheless bound Samuel over for trial based upon Tisha's prior, unsworn statements to the officers.

A. Pretrial Motion to Suppress

Prior to trial, Samuel moved for suppression of Tisha's statements to the agents on the grounds they were coerced. The court heard evidence on the claim on September 18 1998, which established the following:

Tisha gave birth to her daughter on March 10, 1997. On March 12, 1997, a secure custody hearing was held to determine placement for Tisha and her baby. Tisha was placed

in her father's custody, while the baby was placed in the custody of the Department of Social Services; with placement to be determined at an intake conference.

An intake conference was held immediately following the custody hearing. Present were Corporation Counsel Grant Thomas; County intake worker Kim Threw; the social worker on Tisha's delinquency matters, Chris Stanaszak; David Keck, Tisha's attorney; and a physical and sexual abuse investigator from the Department of Social Services, Rodney Schraufnagel. Tisha's father, Peter L., arrived later, as did Police Officer Steven Sagmeister and Peter's girlfriend, Catherine Stelzner. The supposed purpose of the intake conference was to determine where the baby would be placed.

Tisha testified that, at the time of the intake conference, she was tired and under the influence of pain medication, having only recently given birth. She also testified that, despite the limited purpose of the intake conference, a number of questions were asked at that time regarding her sex life with Stanley Samuel and where they had been during their trip. When Tisha declined to answer the questions as irrelevant to placement of her baby, the questioners were not satisfied and told her several times that she must "cooperate" with the police in order to get her baby back. They told her that she would have to give Officer Sagmeister a statement prior to a March 14

hearing on the baby's custody in order to get her back.

Tisha felt quite intimidated and believed that she had to "cooperate" with the investigation of Samuel to get her baby back. Accordingly, she met with Sagmeister and Schraufnagel on March 13, 1997, and gave them the statement they demanded. Beforehand, her father told her he had spoken with Schraufnagel and that what they wanted was an account of a sexual relationship with Samuel before they left Wisconsin and a statement that she wanted to come home. After she gave the inculpatory statement, her baby was returned to her on March 14, 1997.

Immediately after the hearing on March 14, Schraufnagel and Sagmeister had Tisha give a second statement because the tape recording of the first one did not come out. On March 21, 1997, Schraufnagel and Sagmeister had Tisha provide a written statement. Although her daughter had been returned to her and the officers made no express threats to her at that time, Tisha was still intimidated by the statements and results of the intake conference and felt she still needed to continue "cooperating" to keep her baby.

Peter L. testified that he was surprised by the questions at the intake conference, which he thought would be limited to placement for the baby. The questioners became angry for Tisha's "not cooperating" in the investigation and stated that,

in the absence of "cooperation," they could not trust her with the baby. Peter admitted that Schraufnagel had relayed to him the areas of "cooperation" they were interested in addressing.

Cathy Stelzner testified that she asked at the intake conference for the rationale for taking Tisha's baby. She was told that Tisha was not giving them the information that they wanted, but that they would consider giving the baby back if they saw some "cooperation." Stelzner viewed their position as "blackmail" and felt they were using the baby as a pawn.

Although Attorney Keck claimed to have perceived no threats, he acknowledged that Tisha's baby was placed in a foster home pending her "cooperation" with the police, which he understood to mean a statement supporting a criminal prosecution of Samuel

Keck was not with Tisha when she gave the inculpatory statements, and her father was only with her for a short time during the statements and then left.

The state chose to present no witnesses at the hearing.

The circuit court expressed some concern about authority for suppressing coerced statements made by a witness rather than by the defendant and requested briefs on that issue, as well as on the issue of coercion. Tr. 9/18/98 at 6-8, 55. The parties filed briefs, but neither found authority directly addressing the standing issue (R40; R43:2). Defense counsel

argued that the statements were coerced and that the same standards for suppression should apply to witness statements to avoid the incentive to coerce statements from "uncooperative" witnesses, statements which would be inherently untrustworthy. (R40).

The state did not respond to the coercion argument, choosing to rely solely on its claim that Samuel lacked standing to challenge admission of Tisha's coerced statements (*see* R43:2).

By written decision dated November 14, 1997, the circuit court denied the motion to suppress Tisha's statements. D. The court did not decide whether Tisha's prior statements in fact were coerced. Instead, it held that the statements could not be suppressed even if they were coerced:

> I conclude that, if otherwise admissible, Tisha's statements cannot be excluded soley [sic] on the ground that they were coerced, and deny defendant's motion to suppress them.

D:2.

B. Jury Trial and Sentencing

The case proceeded to a jury trial on December 1, 1997.

Tisha L. testified at trial that she met Stanley Samuel through her mother during the summer of 1995. Tisha, who turned 15 in September, 1995, and Samuel developed a

friendship over the following months.

On January 29, 1996, Tisha voluntarily left with Samuel because she wanted to leave and because her mother had kicked her out after she reported her mother for the unsanitary condition of her home and for additional reasons excluded from evidence at trial

Tisha testified that she and Samuel were just friends prior to leaving, and that she left with him because she had nowhere else to stay. Their relationship did not develop into anything more than friendship until March or April of 1996 when they were outside of Wisconsin. The two did not have sex in Wisconsin or before she left her mother's home on January 29, 1996.

At trial, the state once again relied primarily upon Tisha's prior, unsworn statements to the police to the effect that she had sex with Samuel in September, 1995, when she had just turned 15.[1] The state also presented testimony of Tisha's parents to the effect that they did not consent to her leaving with Samuel, and her mother's claim that she did not throw Tisha out of the house, as well as testimony of several collateral witnesses.

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[1] In Wisconsin, prior inconsistent statements are admissible as substantive evidence, and not merely for impeachment. *Vogel v. State*, 96 Wis.2d 372, 291 N.W.2d 838 (1980).

Tisha admitted making the statements to Sagmeister and Schraufnagel, but testified that they were false and made only because she was told that she would not get her baby back unless she "cooperated."

On December 4, 1997, the jury returned verdicts convicting Samuel on all three counts of the information. The circuit court subsequently sentenced Samuel to 38 years imprisonment and a consecutive term of 16 years probation in lieu of a stayed prison term, and entered judgment.

C. Post-Conviction Motions

By post-conviction motion filed as part of his direct appeal, *see* Wis. Stat. (Rule) 809.30, Samuel again raised the suppression issue. He there noted both that this Court had held that statements are coerced and involuntary if extracted by threats to take away a person's child, *see Lynumn v. Illinois*, 372 U.S. 528 (1963), and that several federal courts have held that a defendant's due process rights are violated by admission at trial of involuntary witness statements coerced by the police. (R84:7-13).

Following legal arguments on September 30, 1999, before a different circuit court judge, that court denied the motion. The court concluded that the due process right to suppression of coerced witness statements applies only when the witness also was a codefendant, that the circumstances

established at the hearing were not coercive, that Tisha brought the taking of her child upon herself, and that portions of the statements were corroborated somewhat by other evidence. C.

D. Direct Appeal

Samuel timely appealed, in part on the grounds that admission of Tisha's statements to Officer Sagmeister and Mr. Schraufnagel violated his due process rights. Samuel Court of Appeals Brief at 12-25.

By opinion dated December 27, 2000, the Wisconsin Court of Appeals reversed, holding that due process mandates exclusion of involuntary witness statements extracted by government coercion just as it requires exclusion of statements coerced from the defendant. B:2-10; *State v. Samuel*, 2001 WI App 25, 240 Wis.2d 756, 623 N.W.2d 565. That Court rejected the state's proposed limitations on the traditional standards for assessing voluntariness of a statement, following instead the principle that "'methods offensive when used against an accused do not magically become any less so when exerted against a witness . . .'" B:10, *quoting United States v. Gonzales*, 164 F.3d 1285, 1289 n.1 (10th Cir. 1999)). Because the circuit court had made no factual findings after the pre-trial evidentiary hearing on this issue, however, the Court remanded the case for a new voluntariness hearing. B:12-13.

The Wisconsin Supreme Court subsequently granted the

state's petition for review and then reversed in a decision dated April 25, 2002. A. *State v. Samuel*, 2002 WI 34, 252 Wis.2d 26, 643 N.W.2d 423.

That Court rejected both the state's proposal that suppression be limited to cases of "extreme coercion or torture," A:7, and application of the traditional standards for assessing involuntariness, A:8-9, which ask whether the government coercion has overcome the individual's will to resist, *see, e.g.*, *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26 (1973); *Rogers v. Richmond*, 365 U.S. 534, 544 (1961). Instead, the Court imposed a standard requiring not only involuntariness under traditional standards, but also "egregious" police misconduct "such that it produces statements that are unreliable as a matter of law." A:12. The Court then held that the agents' taking of Tisha's newborn child pending Tisha's "cooperation" with the prosecution of Samuel failed to meet its new standard for suppression. A:17-19.

Justice Bablitch, in dissent, concurred in the Court's new-found due process standard, but found it "impossible . . . to reconcile the enunciated standard with" the Court's ultimate decision to uphold admission of Tisha's statements:

> This does not strike me as a close case at all. As a result, lower courts will ask, with some degree of confusion, if these facts do not do it, what does?

A:21-23.

REASONS FOR ALLOWANCE OF THE WRIT

SUPREME COURT REVIEW IS APPROPRIATE TO CLARIFY WHEN ADMISSION OF COERCED WITNESS STATEMENTS VIOLATES A CRIMINAL DEFENDANT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL

This Court has established that a defendant's constitutional rights are implicated where the state (or even the judge) employs coercive or intimidating language or tactics that substantially interfere with a defense witness' decision whether to testify. *Webb v. Texas*, 409 U.S. 95 (1972) (due process violated where judge "gratuitously singled out" defense witness for a lengthy and unnecessarily strong admonition on dangers of perjury, resulting in witness' refusal to testify). Yet, while the lower courts generally acknowledge that the same principles mandate suppression of witness statements resulting from governmental coercion, they have not agreed on what standard to apply.

Indeed, the four courts which have heard this case thus far have announced four different standards. The trial court found no due process right to suppress coerced witness statements. The post-conviction court found such a right, but limited it to statements coerced from co-defendants. The Court

of Appeals concluded that the same standards for voluntariness applicable to a defendant's own statements apply as well to coerced witness statements. And, the Wisconsin Supreme Court held that suppression is appropriate only when witness statements are both involuntary under traditional due process standards and the result of "egregious" police misconduct which renders them "unreliable as a matter of law."

Clarification by this Court accordingly is both appropriate and necessary to avoid further confusion in the lower courts and among law enforcement personnel.

A. Conflict Among the Lower Courts Justifies Supreme Court Review

The state conceded below that a criminal defendant has a due process right to suppression of coerced witness statements, and the law on this issue is well-established. As the Alaska Supreme Court recently recognized, "both our case law and that of other jurisdictions uniformly recognize a defendant's ability to assert a due process violation based on the coercion of witnesses whose statements are used against the defendant at trial." *Raphael v. State*, 994 P.2d 1004, 1008 (Alaska 2000). *See, e.g.*, *United States v. Gonzales*, 164 F.3d 1285, 1289 (10th Cir. 1999); *Clanton v. Cooper*, 129 F.3d 1147, 1157-58 (10th Cir. 1997) ("[B]ecause the evidence is unreliable and its use offends the Constitution, a person may

challenge the government's use against him or her of a coerced confession given by another person"); *Buckley v. Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994) ("Confessions wrung out of their makers may be less reliable than voluntary confessions, so that using one person's coerced confession at another's trial violates his rights under the due process clause"), *cert. denied*, 513 U.S. 1085 (1995); *United States v. Merkt*, 764 F.2d 266, 274 (5th Cir. 1985) ("A defendant may assert her own fifth amendment right to a fair trial as a valid objection to the introduction of statements extracted from a non-defendant by coercion or other inquisitional tactics" (footnote and citations omitted)); *United States v. Cunningham v. DeRobertis*, 719 F.2d 892, 896 (7th Cir. 1983) (violation of another's Fifth Amendment rights may violate one's own right to a fair trial); *Bradford v. Johnson*, 476 F.2d 66 (6th Cir. 1973), *aff'g* 354 F.Supp. 1331 (E.D. Mich. 1972). *See also LaFrance v. Bohlinger*, 499 F.2d 29, 34 (1st Cir. 1974):

> It is unthinkable that a statement obtained by torture or by other conduct belonging only in a police state should be admitted at the government's behest in order to bolster its case . . .. Yet methods offensive when used against an accused do not magically become any less so when exerted against a witness.

Justice Rutledge, dissenting in *Malinski v. New York*,

324 U.S. 401 (1945), agreed:

> Due process does not permit one to be convicted upon his own coerced confession. It should not allow him to be convicted upon a confession wrung from another by coercion. A conviction supported only by such a confession could be but a variation of trial by ordeal.

Id. at 430-31 (Rutledge, J., dissenting). *See also Bradford v. Michigan*, 394 U.S. 1022 (1968) (Warren, Douglas, & Marshall, JJ., dissenting from denial of certiorari).

This right to suppression of coerced witness statements is based in the due process right to a fair trial. As such, it is wholly independent of the defendant's right to be free from compelled self-incrimination or from use of his or her own coerced statements at trial. *E.g.*, *Gonzales*, 164 F.3d at 1289.

Despite this agreement on the general principle, there appears to be no such agreement on the applicable standard for assessing when a coerced witness statement must be suppressed as a matter of due process. Instead, the cases reflect widespread confusion regarding application of the due process principles in such cases, confusion which only this Court can remedy.

For instance, the Wisconsin Supreme Court's decision in this case asserts that involuntary witness statements resulting from state coercion are admissible at another's trial so long as

they did not result from police misconduct so "egregious" that "it produces statements that are unreliable as a matter of law." A:2. Under that standard, a witness' statement which is clearly involuntary under traditional due process standards is deemed admissible so long as the coercive governmental actions are not deemed to be "egregious." Left undefined is exactly what is required over and above the types of egregious governmental coercion already required under the traditional due process standard. All we know from the decision below is that the type of preying on the maternal instinct condemned by this Court as the equivalent of physical torture in *Lynumn v. Illinois*, 372 U.S. 528 (1963) (oral confession, made by defendant only after police told her that state aid would be cut off and her children taken from her, was coerced in violation of due process), apparently is not enough.

Prior to the Wisconsin Supreme Court's decision in this case, the courts which seriously considered the issue had concluded that the same due process standard traditionally used to assess the voluntariness of a defendant's own statements applies as well to a witness' statements. *E.g.*, *United States v. Gonzales*, 164 F.3d 1285, 1289 n.1 (10th Cir. 1999); *State v. Samuel*, 2001 WI App. 25, 240 Wis.2d 756, 623 N.W.2d 565, *rev'd*, 2002 WI 34, 252 Wis.2d 26, 643 N.W.2d 423; *Raphael v. State*, 994 P.2d 1004, 1008 (Alaska 2000); *see Clanton v.*

Cooper, 129 F.3d 1147, 1158-59 (10th Cir. 1997) (applying same standard to coerced witness statements). These cases recognize that "'methods offensive when used against an accused do not magically become any less so when exerted against a witness.'" *Gonzales*, 164 F.3d at 1289 n.1 (citation omitted).

A few other cases, albeit without much analysis, have suggested a much higher due process standard, stating that "[d]ue process is implicated when the government seeks a conviction through use of evidence obtained by extreme coercion or torture." *United States v. Chiavola*, 744 F.2d 1271, 1273 (7th Cir. 1984); *People v. Bell*, 548 N.E.2d 397, 401 (Ill. App. 1989). *See also United States v. Fredricks*, 586 F.2d 470, 481 n.14 (5th Cir. 1978) (*dicta*) (referring to grounds for exclusion of "statements extracted from a nondefendant by extreme coercion and inquisitional tactics"). However, these decisions appear to be based on a misreading of earlier cases, in which the witnesses in fact had been subjected to extreme coercion or torture, as establishing a rule that such extreme coercion is not only sufficient but necessary for a due process challenge. *See Bradford v. Johnson*, *supra*; *LaFrance*, *supra*.

Yet another line of decisions has upheld admission of coerced, involuntary witness statements when used purely for impeachment purposes, while emphasizing that the evidence

was not used as substantive evidence of guilt. *E.g.*, *Wilcox v. Ford*, 813 F.2d 1140, 1149 (11th Cir.), *cert. denied*, 484 U.S. 925 (1987); *Pinder v. State*, 520 A.2d 1101, 1106-07 (Md. App. 1987); *State v. Vargas*, 420 A.2d 809, 814-15 (R.I. 1980). *But see LaFrance*, 499 F.2d at 34-35 (use of coerced, involuntary witness statement for impeachment violates due process); *Vargas v. Brown*, 512 F.Supp. 271 (D. R.I. 1981) (same).

Adding to the confusion of these multiple standards are the significantly different analyses used by the courts in deciding what standard to apply in assessing whether admission of coerced witness statements violates due process. Some, such as the Wisconsin Supreme Court in this case, conclude that something more than the traditional standard of involuntariness must be shown because some of the justifications commonly cited for suppression of a defendant's own involuntary statements do not apply in cases of coerced witness statements. A:8-9; *see Johnson v. Washington*, 119 F.3d 513, 518 n.2 (7th Cir.), *cert. denied*, 522 U.S. 973 (1997); *Wilcox v. State*, 301 S.E.2d 251, 258 (Ga 1983). For instance, the interest in not compelling evidence of the defendant's guilt from his own mouth, *see Miranda v. Arizona*, 384 U.S. 436, 460 (1966), is not implicated by police coercion of witnesses.

Other courts, however, recognize that the primary factors supporting exclusion of involuntary statements on due

process grounds apply fully to coerced witness statements as well as to coerced statements of the defendant. *E.g.*, *Gonzales*, 164 F.3d at 1289 n.1; *Clanton*, 129 F.3d at 1157-58; *Fitzsimmons*, 20 F.3d at 795; *LaFrance*, 499 F.2d at 34.

This Court has explained exclusion of coerced statements on the grounds that involuntary statements are inherently untrustworthy and their use violates our fundamental sense of decency. *Jackson v. Denno*, 378 U.S. 368, 385-86 (1964). What this Court observed about coerced confessions applies equally to statements coerced from those not even suspected of crimes:

> The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.

Spano v. New York, 360 U.S. 315, 320 (1959).

Indeed, all of these reasons for suppression of statements coerced from a suspect apply equally when it is a witness whose statements are coerced. *See, e.g.*, *Dimmick v. State*, 473 P.2d 616, 619-20 (Alaska 1970):

> Statements which are the product of coercion may be unreliable and untrustworthy, and thus should be excluded as evidence against one not coerced into making them. But more important, coerced statements are condemned because of the "strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will." Those human values may be as much involved and in need of protection when an involuntary statement is used to convict one not coerced into making it as well as when used against the one from whom the statement was obtained.

See also People v. Underwood, 389 P.2d 937, 943 (Cal. 1964):

> [an involuntary] statement by a witness is no more trustworthy than one by a defendant, its admission in evidence to aid in conviction would be offensive to the community's sense of fair play and decency, and its exclusion, like the exclusion of involuntary statements of a defendant, would serve to discourage the use of improper pressures during the questioning of persons in regard to crime.

There is no apparent reason why the types of improper coercion deemed unacceptable when applied to criminal suspects should be encouraged by permissive due process standards when the same manipulative techniques are applied to witnesses. The actions of state agents preying upon the

maternal instincts of a mother by taking or threatening to take her child pending her "cooperation" with the police was egregious and unacceptable when this Court decided *Lynumn*, *supra*, in 1963, and they remain so today. A legal standard which allows the state to benefit from its own wrongdoing can only encourage such misconduct.

The Wisconsin Supreme Court's decision conflicts with those of several other state and federal courts and reflects a general state of confusion among the lower courts regarding the proper standard to apply in assessing admission of coerced witness statements. This case therefore presents the type of compelling reasons generally required for the grant of certiorari. *See* Sup. Ct. R. 10(b).

CONCLUSION

For the reasons stated, the Court should grant a writ of certiorari to review the decision of the Wisconsin Supreme Court.

Dated at Milwaukee, Wisconsin, July 23, 2002.

Respectfully submitted,

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Samuel Cert. Pet.wpd

APPENDIX A

STATE OF WISCONSIN
IN SUPREME COURT

Case No. 99-2587-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

STANLEY A. SAMUEL,

Defendant-Appellant.

January 17, 1995

REVIEW of a decision of the Court of Appeals. *Reversed.*

¶ 1 ANN WALSH BRADLEY, J. The petitioner, State of Wisconsin, seeks review of a published court of appeals decision reversing the circuit court's judgment of conviction entered against the defendant, Stanley Samuel, on charges of sexual assault, abduction, and interference with custody.[1] The State asserts that the court of appeals erred in concluding that the same standard for suppressing a defendant's involuntary statement should also apply when a defendant seeks to suppress an allegedly involuntary statement of a witness.

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[1] *See State v. Samuel,* 2001 WI App 25, ¶ 23, 240 Wis.2d 756, 623 N.W.2d 565 (Ct.App.2000) (reversing and remanding a judgment and order of the Circuit Court for Winnebago County, Thomas S. Williams, Judge).

¶ 2 We conclude that the standards are different and that when a defendant seeks to suppress an allegedly involuntary witness statement, the coercive police misconduct at issue must be egregious such that it produces statements that are unreliable as a matter of law. In addition, we determine that when a defendant seeks to suppress statements under this standard, the proper procedure to follow is set forth in *State v. Velez*, 224 Wis.2d 1, 589 N.W.2d 9 (1999). Finally, we apply the test we have identified to the witness statements at issue and conclude that they properly were admitted into evidence. Accordingly, we reverse the court of appeals.

I

¶ 3 In January 1996, Tisha L., then a minor, left Winnebago County with Samuel, a 47-year-old friend. Samuel and Tisha stayed in Milwaukee for about a week, then left Wisconsin and traveled throughout several Midwestern states. In March 1997, 13 months after they left Wisconsin, Samuel and Tisha were taken into custody by the State of Missouri.

¶ 4 Tisha was pregnant, and on March 10, the day after she returned to Wisconsin, her baby was born. Two days later, March 12, a hearing was held before a court commissioner at which it was determined that Tisha would be placed with her father. Further discussion on the issue of placement of Tisha's baby was left to an intake conference following the hearing. At the conference, Tisha was represented by an attorney. Others present for all or part of the conference included City of Oshkosh police officer Steven Sagmeister, two social workers, Tisha's father, and Cathy Stelzner, his girlfriend. Although accounts differ as to what was said at the conference, at some time during or immediately following the conference, Tisha was told to contact Sagmeister to give him a

statement with regard to "what had happened the previous year." After the conference, Tisha was allowed to go home with her father and Stelzner, and the baby was temporarily placed in foster care.

¶ 5 Tisha's father and Officer Sagmeister made arrangements for Tisha to meet with Sagmeister on March 13, 1997. On that day, Tisha gave a tape recorded statement to Sagmeister and one of the social workers, Rod Schraufnagel, at the police station. She said that she and Samuel had been sexually active in Winnebago County before they left the state. At the time of that sexual activity, Tisha was under age 16.[2]

¶ 6 The next morning, March 14, another hearing was held before the court commissioner, at which Tisha's baby was returned to her. Following the hearing, Officer Sagmeister asked Tisha if she would give a second statement because the tape from the first day had not turned out very well. Tisha and her father agreed, and Sagmeister and Schraufnagel conducted another recorded interview with Tisha. Again, Tisha indicated that she had sexual relations with Samuel in 1995 prior to leaving Winnebago County.

¶ 7 Tisha gave a third statement on March 21, when Officer Sagmeister came to her residence. After questioning Tisha, Sagmeister summarized her answers in a written statement that Tisha signed. The written statement shows that Tisha and Samuel first had sexual relations in the middle of September 1995 and also had sexual relations twice in Milwaukee after leaving Winnebago County in January 1996.

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[2] The information shows Tisha's date of birth as September 7, 1980.

¶ 8 Samuel was formally charged with interference with custody, abduction, and sexual assault of a child. He moved in limine to suppress all of Tisha's statements. At the hearing on the motion, Samuel argued that Tisha's statements should be suppressed because they were the result of police threats or coercion. Tisha, her father, her attorney, and Stelzner testified with regard to the circumstances surrounding both the intake conference and the times at which Tisha gave her statements.

¶ 9 The circuit court denied the motion, determining that Samuel was without standing to assert that Tisha's statements were coerced in violation of her constitutional rights. Instead, the court concluded, it was for the jury to determine the credibility and weight of Tisha's statements.

¶ 10 At trial, the State called Tisha as a witness, and she testified that she and Samuel had a sexual relationship, but that they did not have sexual intercourse until March or April 1996, which was months after she left Wisconsin with Samuel. While Tisha was still under direct examination, the State proceeded to impeach her with her prior inconsistent statements:

Q Isn't it also true, however, Tisha, that you have given three statements prior to this date which indicated you became sexually active with Mr. Samuel in September of 1995?

A Yes, I think I did.

The State showed Tisha her March 21, 1997 written statement and asked her several questions about it. Tisha maintained that she did not remember saying anything in the statement with regard to when, where, or how often she and Samuel had sexual relations. She later

testified that the statements were not true, but that she had given them because she felt pressured to incriminate Samuel at the intake conference.

¶ 11 Tisha's father, Stelzner, Officer Sagmeister, and Schraufnagel also gave testimony relevant to the circumstances surrounding Tisha's statements. Although the witnesses each had different perceptions as to whether Tisha was improperly pressured, no one recalled that she was expressly told she would lose her baby unless she implicated Samuel.

¶ 12 The jury convicted Samuel on all three charges. Samuel brought a postconviction motion, again arguing that Tisha's statements should have been suppressed because they were coerced. The circuit court denied the motion. The court determined that regardless of whether Tisha's statements were coerced, Samuel had no standing to challenge them, and the question of any witness coercion was best left to the jury.

¶ 13 Samuel appealed, and the court of appeals reversed. Citing *United States v. Gonzales,* 164 F.3d 1285, 1289 n. 1 (10th Cir.1999), the court reasoned that police methods of coercion that are "offensive when used against an accused do not magically become any less so when exerted against a witness." Referring to the test for involuntariness set forth in *State v. Clappes,* 136 Wis.2d 222, 401 N.W.2d 759 (1987), the court of appeals concluded that the standard for suppressing a defendant's involuntary statements should also apply to the suppression of involuntary witness statements.

¶ 14 In *Clappes,* 136 Wis.2d at 236, 401 N.W.2d 759, this court applied a totality of the circumstances test in order to assess whether confessions are involuntary. That test requires courts to "balance the

personal characteristics of the defendant against the pressures imposed upon him by police in order to induce him to respond to the questioning." *Id.* In determining whether a confession is voluntary, the essential inquiry is whether the confession was procured via police coercion. *Id.* at 235-36, 401 N.W.2d 759. The court of appeals remanded Samuel's case for the circuit court to determine whether, under the *Clappes* test, Tisha's statements were involuntary.

II

¶ 15 We are asked to determine the proper standard under which a witness's involuntary statements must be suppressed at the trial of a criminal defendant. Whether evidence should be suppressed is a question of constitutional fact. *See State v. Anderson,* 165 Wis.2d 441, 447, 477 N.W.2d 277 (1991); *State v. Bermudez,* 221 Wis.2d 338, 346, 585 N.W.2d 628 (Ct.App.1998). In reviewing questions of constitutional fact, we uphold a circuit court's factual findings unless clearly erroneous, but we independently determine whether those facts meet the constitutional standard. *State v. Dagnall,* 2000 WI 82, ¶ 27, 236 Wis.2d 339, 612 N.W.2d 680; *State v. Phillips,* 218 Wis.2d 180, 189-90, 577 N.W.2d 794 (1998).

¶ 16 In making our determination of whether Tisha's statements should have been suppressed, we consider in turn the standards advanced by the State and Samuel. However, we conclude that neither standard strikes the proper balance between the Fourteenth Amendment's guarantee of due process and the fact that witness statements that are in some sense compelled are frequently neither unreliable nor the product of egregious police misconduct. In steering a course between the positions advanced by the parties and using due process as our guide, we recognize there are circumstances under which egregious police misconduct deprives the defendant of

a fair trial.

III

¶ 17 The State contends that a defendant's right to due process is offended only where witness statements are extracted by "extreme coercion or torture." *United States v. Chiavola,* 744 F.2d 1271, 1273 (7th Cir.1984). It argues that absent such extreme circumstances, it is the jury's role to weigh and assess credibility. Samuel asserts that involuntary witness statements should be subject to the same rule of suppression as a criminal defendant's involuntary confession. *See Clappes,* 136 Wis.2d at 222, 401 N.W.2d 759. He argues that a defendant's Fourteenth Amendment due process right to a fair trial bars the admission of all involuntary witness statements that are the product of police coercion.

¶ 18 With due process as our touchstone, we turn first to the standard advanced by the State. We are not convinced, as the State asserts, that a defendant's right to due process will be offended only where the witness statements used against the defendant derive from police conduct that amounts to extreme coercion or torture. The "blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn v. Alabama,* 361 U.S. 199, 206, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960); *see also Raphael v. State,* 994 P.2d 1004, 1008 (Alaska 2000). Although the United States Supreme Court in *Blackburn* was referring to the defendant, we similarly decline to hold that the blood of a witness is a necessary hallmark of an unconstitutional trial. Instead, we determine there are circumstances where witness statements derived by egregious police misconduct short of extreme coercion or torture must be suppressed in order to uphold fundamental fairness to a defendant. In short, we reject the State's test as setting the bar too high to satisfy due process.

¶ 19 Next, we turn to the standard advanced by Samuel, that witness statements should be suppressed based on the same test as applied to a defendant's confession. We begin by examining the rights protected along with the purposes served by the suppression of involuntary confessions. It is well established that confessions by criminal defendants must be voluntary in order to be admitted as evidence at trial. *See State v. Hunt,* 53 Wis.2d 734, 740, 193 N.W.2d 858 (1972); *see also Lynumn v. Illinois,* 372 U.S. 528, 534, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963).

¶ 20 The rule requiring suppression of involuntary confessions has long been grounded in the defendant's due process rights. *See Brown v. Mississippi,* 297 U.S. 278, 286, 56 S.Ct. 461, 80 L.Ed. 682 (1936). In addition, in *Malloy v. Hogan,* 378 U.S. 1, 7, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964), and *Miranda v. Arizona,* 384 U.S. 436, 464 n. 43, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the Supreme Court linked the rule to the Fifth Amendment right against self-incrimination.

¶ 21 Several related purposes have been cited in support of the rule. These include the "deep-rooted feeling that the police must obey the law while enforcing the law," *Arizona v. Fulminante,* 499 U.S. 279, 293, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); the notion that the government should be required to produce evidence against the accused "by its own independent labors rather than by the cruel, simple expedient of compelling it from his own mouth," *Miranda,* 384 U.S. at 460, 86 S.Ct. 1602; and, a concern that statements that are the product of coercion are more likely to be inherently untrustworthy than voluntary statements, *Spano v. New York,* 360 U.S. 315, 320, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959).

¶ 22 These rights and purposes do not all apply when a defendant seeks to suppress involuntary witness statements. *See LaFrance v.*

Bohlinger, 499 F.2d 29, 33-34 (1st Cir.1974); *State v. Vargas,* 420 A.2d 809, 814 (R.I.1980). A nondefendant witness's right against self-incrimination generally is not in play at the trial of the defendant. "When the defendant seeks to exclude the fruit of the coerced statement of another ... the policy of protecting the defendant from being compelled to aid the state in convicting him is not at stake." *People v. Badgett,* 10 Cal.4th 330, 41 Cal.Rptr.2d 635, 895 P.2d 877, 886 (1995). Likewise, the idea that the government must produce evidence by its own independent labors rather than by compelling it from the mouth of the accused does not seem to justify the suppression of statements by those other than the accused.

¶ 23 Therefore, we disagree with Samuel that the *Clappes* test governing involuntary confessions can alone dictate the standard for suppression of involuntary witness statements. Because the rights protected and the purposes served by suppression of a defendant's confession do not all apply when considering the suppression of a witness's statement, something additional is needed before a witness's statement will be suppressed. The *Clappes* test sets the bar for suppression of witness statements too low. Although we agree that the suppression of witness statements requires that those statements be involuntary under *Clappes,* it also requires something more.

¶ 24 Often, witness statements that are in some sense compelled are neither inherently unreliable nor the product of police misconduct. For example, we have held that, as a general rule, a defendant's right to a fair trial is not violated by the admission of testimony by a defendant's accomplice even where the State has expressly granted concessions to the accomplice in exchange for the testimony. *State v. Nerison,* 136 Wis.2d 37, 45, 401 N.W.2d 1 (1987). "[C]ross-examination, not exclusion, is the proper tool for challenging the weight and credibility of accomplice testimony." *Nerison,* 136

Wis.2d at 45, 401 N.W.2d 1; *see also State v. Miller,* 231 Wis.2d 447, 465, 605 N.W.2d 567 (Ct.App.1999).[3]

¶ 25 A rule suppressing witness statements must recognize the admissibility of evidence such as accomplice testimony and also protect a defendant's due process right to a fair trial. Although we have rejected Samuel's test as setting the bar too low, we acknowledge that some of the purposes served by the suppression of involuntary confessions apply equally in the context of involuntary witness statements. Both the maxim that police obey the law while enforcing the law and the need to avoid convictions based on inherently unreliable evidence apply whether the statements at issue spring from the mouth of the criminally accused or another. Although there is no "absolute parallel" between involuntary confessions and involuntary witness statements, *LaFrance,* 499 F.2d at 35, there is a point at which some of the same considerations apply to both.

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[3] When the State relies on accomplice testimony, the defendant's right to a fair trial is protected as long as there is:

> (1) full disclosure of the terms of the agreements struck with the witnesses; (2) the opportunity for full cross-examination of those witnesses concerning the agreements and the effect of those agreements on the testimony of the witnesses; and (3) instructions cautioning the jury to carefully evaluate the weight and credibility of the testimony of such witnesses who have been induced by agreements with the state to testify against the defendant.

State v. Nerison, 136 Wis.2d 37, 46, 401 N.W.2d 1 (1987); *State v. Miller,* 231 Wis.2d 447, 465, 605 N.W.2d 567 (Ct.App.1999).

¶ 26 In *United States v. Merkt,* 764 F.2d 266, 274 (5th Cir.1985), the Fifth Circuit Court of Appeals acknowledged that the fact that witnesses' statements were themselves unlawfully obtained was not alone sufficient to necessitate suppression. Instead, the Fifth Circuit determined that it was "egregious" intimidation and coercion of witnesses that would prompt the suppression of their statements. *Id.* at 275. Under such circumstances, "the government's investigation methods result[ ] in a fundamentally unfair trial." *Id.* at 274. In *Merkt,* the court discussed *United States v. Fredericks,* 586 F.2d 470, 481 n. 14 (5th Cir.1978), in which it had reasoned that the fundamental fairness essential to due process is undermined when a witness's statement is obtained through "shocking and intentional" police misconduct.

¶ 27 Likewise, this court has recognized that it is when police misconduct rises to an "egregious" level that it offends due process. *State v. Hanson,* 136 Wis.2d 195, 211, 401 N.W.2d 771 (1987) (citing *Moran v. Burbine,* 475 U.S. 412, 432, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986)). In *Hanson,* we concluded that when a suspect has not invoked his Fifth Amendment right to counsel, police may withhold information that there is an attorney available asking to see him. However, we cautioned, as did the Supreme Court in *Burbine,* that "on facts more egregious than those presented ... police deception might rise to a level of a due process violation." *Hanson,* 136 Wis.2d at 211, 401 N.W.2d 771 (quoting *Burbine,* 475 U.S. at 432, 106 S.Ct. 1135).

¶ 28 Similarly, in *Badgett,* 41 Cal.Rptr.2d 635, 895 P.2d at 887, the California Supreme Court concluded that in order for defendants to assert violations of their due process rights, they must allege that the coercive methods used to obtain a witness statement were such that they would actually affect the reliability of the evidence presented at

trial. The court explained that "[t]estimony of third parties that is offered at trial should not be subject to exclusion unless the defendant demonstrates that improper coercion has impaired the reliability of the testimony." *Id.*

¶ 29 As this court has observed in the context of involuntary confessions, although they may in some cases be unreliable, in other cases they are reliable. See *State v. Agnello*, 226 Wis.2d 164, 173, 593 N.W.2d 427 (1999); *J.G. v. State*, 119 Wis.2d 748, 760, 350 N.W.2d 668 (1984). The same can be said of involuntary witness statements. Involuntary confessions are suppressed regardless of the truthfulness of a confession in an individual case. See *Lego v. Twomey*, 404 U.S. 477, 484-85, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972); *Agnello*, 226 Wis.2d at 173, 593 N.W.2d 427. However, because a defendant's right against self-incrimination is not at issue with regard to statements by others, the suppression of those statements at the defendant's trial demands a more rigorous standard.

¶ 30 With due process as our touchstone, we conclude that when a defendant seeks to suppress witness statements as the product of coercion, the police misconduct must be more than that set forth in *Clappes*. It must be egregious such that it produces statements that are unreliable as a matter of law. The coercion must be egregious because, as we have shown, it is typically "egregious" police misconduct that offends due process. Our concern is with police misconduct that, by its nature, undermines confidence in the reliability of a witness's statements. Witness statements obtained by police methods that induce lying have no place in our system of justice because a conviction based on unreliable evidence undermines the fundamental fairness of a defendant's trial. In short, due process demands that the State not marshal its resources against an accused in a manner that results in a conviction based on unreliable evidence

obtained through egregious police practices.

¶31 Upon an examination of the case law and the parties' arguments, we glean several factors to consider in determining whether police misconduct is egregious such that it produces statements that are unreliable as a matter of law. These factors include (1) whether a witness was coached on what to say; (2) whether investigating authorities asked questions blatantly tailored to extract a particular answer, *see Gonzales,* 164 F.3d at 1289; (3) whether the authorities made a threat with consequences that would be unlawful if carried out, *see United States v. Tingle,* 658 F.2d 1332, 1335-36 (9th Cir.1981);[4] (4) whether the witness was given an express and unlawful quid pro quo; (5) whether the State had a separate legitimate purpose for its conduct, *Tingle,* 658 F.2d at 1337; and, (6) whether the witness was represented by an attorney at the time of the coercion or statement, *see Merkt,* 764 F.2d at 269. The presence of the first four factors weighs in favor of suppression while the presence of the second two factors weighs against it. Application of these and other relevant factors will help to ensure that it is unreliable evidence that is suppressed. It will also help to guarantee that the State does not obtain convictions based on practices that offend fundamental fairness.

¶ 32 In cases where an application of the factors results in a determination that witness statements at issue will not be suppressed, the defendant nevertheless retains the ability to test the credibility of the witness statements through, among other approaches, cross-

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[4] We recognize that *United States v. Tingle,* 658 F.2d 1332 (9th Cir.1981), involved involuntary confessions by a defendant; nevertheless, we deem its discussion helpful in identifying criteria that are useful in a suppression determination under the test we apply to Samuel.

examination before the jury. *See Nerison,* 136 Wis.2d at 45, 401 N.W.2d 1. Cross-examination is an essential tool for "sifting the conscience of the witness" and thereby protecting a defendant's rights at trial. *State v. Bauer,* 109 Wis.2d 204, 208 n. 3, 325 N.W.2d 857 (1982) (citing *Mattox v. United States,* 156 U.S. 237, 242-43, 15 S.Ct. 337, 39 L.Ed. 409 (1895)). The jury, of course, has the duty to scrutinize and weigh the testimony of witnesses and to determine the effect of the evidence as a whole. *See Hampton v. State,* 92 Wis.2d 450, 462, 285 N.W.2d 868 (1979); Wis JI-- Criminal 300.[5] These safeguards--cross-examination and the jury's role in weighing the evidence--help ensure a fair trial where due process does not require the suppression of witness statements.

IV

¶ 33 We next address the proper procedure for circuit courts and parties to follow when a defendant wishes to assert that witness statements should be suppressed under the standards we have identified. Both Samuel and the State refer to *Velez,* 224 Wis.2d 1, 589 N.W.2d 9, as providing a model procedure. The issue presented in *Velez* was whether a defendant is entitled to an evidentiary hearing upon an allegation that the State intentionally "manipulated the system" to avoid juvenile court jurisdiction and charge a defendant as an adult. *Id.* at 6, 589 N.W.2d 9. In *Velez,* as here, it was the defendant's due process rights that were at issue. *See id.* at 14, 589 N.W.2d 9.

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[5] Here, the jury received a version of the standard instruction on witness credibility, which includes an instruction that the jury should consider motives for falsifying testimony. *See* Wis JI--Criminal 300.

¶ 34 Therefore, we agree with the parties that the procedures outlined in *Velez* should be applied in this case. As the circuit court correctly observed in its decision on Samuel's suppression motion, although the jury is normally the sole judge of the credibility and weight given to witness statements,

> [e]xceptions are made where a threshold finding is made by the court, since presentation to the jury would expose them to evidence which might be otherwise barred by constitutional principles.

The *Velez* procedures will protect a defendant's due process rights while also preserving scarce judicial resources by eliminating unnecessary evidentiary hearings. *See* 224 Wis.2d at 12, 589 N.W.2d 9.

¶ 35 Under *Velez,* first the defendant must bring a motion to suppress, alleging facts sufficient to show that a statement was involuntary under *Clappes* and that the police misconduct at issue is egregious such that it produces statements that are unreliable as a matter of law. *See Velez,* 224 Wis.2d at 18, 589 N.W.2d 9. If the motion alleges facts which, if true, would entitle the defendant to relief, then the circuit court must hold an evidentiary hearing. *Id.; see also State v. Bentley,* 201 Wis.2d 303, 310, 548 N.W.2d 50 (1996). However, if the motion does not allege sufficient facts, the circuit court has the discretion to deny an evidentiary hearing upon a finding that any one of the following circumstances is present: (1) the defendant failed to allege sufficient facts in the motion to raise a question of material fact; (2) the defendant presented only conclusory allegations; or (3) the record conclusively demonstrates that the defendant is not entitled to relief. *Velez,* 224 Wis.2d at 17-18, 589 N.W.2d 9.

¶ 36 Even where the defendant has not met this initial burden of production and the circuit court has the discretion to deny an evidentiary hearing, in order to properly exercise that discretion, it must "carefully consider the record, the motion, counsels' arguments and/or offers of proof, and the law." *Velez,* 224 Wis.2d at 17, 589 N.W.2d 9 (quoting *State v. Garner,* 207 Wis.2d 520, 534-35, 558 N.W.2d 916 (Ct.App.1996)). Moreover, when there is a reasonable possibility that the defendant will establish the factual basis at an evidentiary hearing, the circuit court must provide the defendant with the opportunity to develop the record. *Id.* at 18, 589 N.W.2d 9.

¶ 37 In other words, there will be cases where the court cannot properly exercise its discretion in denying an evidentiary hearing without first holding a nonevidentiary hearing on the defendant's motion to suppress. *See Velez,* 224 Wis.2d at 17, 589 N.W.2d 9. The facts that the defendant must establish and the determinations the circuit court must make will be informed by the standard and factors we have identified.

¶ 38 We must also address the question of who bears the burden of persuasion once the defendant has established a factual basis necessitating an evidentiary hearing. Samuel argues that the burden of persuasion should lie with the State, but acknowledges that the level of that burden is the preponderance of the evidence. We agree.

¶ 39 In *Velez,* this court suggested that due process was not offended by placing a burden of production on the defendant because the State bore the ultimate burden of persuasion with regard to the government misconduct at issue. *See* 224 Wis.2d at 16, 589 N.W.2d 9. Where a defendant makes a prima facie showing that a confession is involuntary, the State bears the burden of proving, by the preponderance of the evidence, that it is not. *Agnello,* 226 Wis.2d at

179, 593 N.W.2d 427; *State v. Williams,* 220 Wis.2d 458, 463, 583 N.W.2d 845 (Ct.App.1998). Although we have identified a different substantive test for the suppression of witness statements, given *Velez* and the rule on the burden of proof for confessions, we discern no need to inject a different rule into our due process jurisprudence. The burden of persuasion lies with the State, and the burden the State must meet is a preponderance of the evidence.

V

¶ 40 As noted earlier, the question of whether evidence must be suppressed under a constitutional standard is ultimately a question that this court determines independently. *Anderson,* 165 Wis.2d at 447, 477 N.W.2d 277. Upon an examination of the record in this case, we conclude as a matter of law that Tisha's statements should not have been suppressed. No reasonable view of the evidence can support the conclusion that Tisha's statements were coerced by egregious methods that produced statements unreliable as a matter of law. Indeed, the circuit court at the postconviction motion hearing, after hearing all of the evidence, opined that Tisha's statements were not the product of police coercion. The circuit court stated:

> [A]nd in this case, in all honesty, the Court wouldn't be able to even find coercion. This is a totally different type of circumstance than say a witness comes in and she's a mother and the police say if you don't tell us what we want to hear, we're taking your child. This is a case in which the mother was a minor on the run, who gave birth while on the run and was subsequently returned. It was her acts for which the child was initially taken into custody ... it was her acts beforehand which led to originally there being an issue as to whether the child would remain with her or not. And in light of the fact as well that she was not told what to say but just to

cooperate here, doesn't to this court say that it's been inferred that she has to say what they want her to say or she won't get her child back.

¶41 Nonetheless, we apply the factors we have identified, ultimately arriving at the same result as the circuit court.[6] We first note that there is little if any credible evidence that Tisha was specifically coached on what to say or that the authorities' questions were blatantly tailored in order to compel her to implicate Samuel. On the contrary, Tisha's father testified that neither Officer Sagmeister nor the social worker, Schraufnagel, told Tisha that she needed to say anything in particular in order to get her baby back. Tisha's testimony focused on the fact that she was repeatedly told she had to "cooperate" in general. Although at one point in her testimony she indicated that someone said she would not get her baby back until she implicated Samuel, when pressed, she could not remember who had said this or whether those were the exact words the speaker had used.

¶ 42 Similarly, the record does not show that authorities ever expressly threatened Tisha with the loss of her baby, although that was a possibility regardless of whether Tisha implicated Samuel.

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[6] The dissent concludes that Samuel's case should, "at the very least," be remanded to the circuit court for a determination of whether Tisha's allegedly coerced statements should be suppressed. Dissent at ¶ 50. It appears to overlook, however, that the circuit court already opined that the statements were not the product of police coercion. As noted above in paragraph 40, the circuit court stated that "in all honesty, the Court wouldn't be able to even find coercion." It would be a futile exercise to remand this case for a determination by the circuit court of whether the coercive police misconduct here was egregious such that it produced statements unreliable as a matter of law when the circuit court stated it "wouldn't be able to even find coercion."

Stelzner testified that she thought there was "blackmail" involved, but was unable to explain in any detail why she so believed. The record does not show that anyone presented Tisha with an illegal quid pro quo, such as a promise that she would be able to keep her baby if she agreed to implicate Samuel. In addition, the factor of representation by counsel does not weigh strongly in favor of either Samuel or the State. Although Tisha was represented by an attorney at the intake conference, she was not represented at other times in which Samuel alleges she was coerced.

¶ 43 Finally, and perhaps most convincingly in this case, the authorities involved had a separate legitimate purpose for questioning Tisha with regard to Samuel. They needed to determine the proper placement of her baby, which depended on an assessment of whether she was a flight risk and whether she could be trusted to care properly for her newborn child. Although we recognize there may be cases where a legitimate purpose for questioning a witness is transformed into an illegitimate pretext for a criminal investigation, the record in this case does not support such a conclusion.

VI

¶ 44 In sum, the test for the suppression of witness statements is a *Clappes*-plus test. The court, in *Clappes,* applied a totality of the circumstances test when assessing whether a defendant's confession is voluntary. The *Clappes* test requires a court to look at both the defendant's response as well as the police misconduct, and to "balance the personal characteristics of the defendant against the pressures imposed upon him by the police in order to induce him to respond to the questioning." 136 Wis.2d at 236, 401 N.W.2d 759.

¶ 45 Because the rights protected and the purposes served by

suppression of a defendant's confession do not all apply when considering the suppression of a witness's statement, something more is needed before a witness's statement will be suppressed. That something more is the degree of police misconduct.

¶ 46 Thus, as in *Clappes*, a totality of circumstances test is applied when considering the suppression of a witness statement. The personal characteristics of a witness must be balanced against the conduct of the police in pressuring a witness in order to induce a response. However, we determine that when a defendant seeks to suppress witness statements as involuntary, the coercive police misconduct must be greater than that necessary under *Clappes* for the suppression of a defendant's confession: it must be egregious such that it produces statements that are unreliable as a matter of law.

¶ 47 In addition, we determine that where the defendant seeks to suppress witness statements, the parties must follow the procedure set forth in *Velez*. Finally, we conclude that on the record before us, Tisha's statements were not derived from egregious police misconduct that would produce statements unreliable as a matter of law.[7] Accordingly, we reverse the court of appeals.

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[7] The court of appeals concluded that it was required to reverse Samuel's convictions for abduction and interference with custody because, if the circuit court were to determine on remand that Tisha's statements were inadmissible, the admission of the statements may have improperly undermined Tisha's credibility and tainted the jury's assessment of the evidence at trial. Because we conclude that Tisha's statements were properly before the jury, we need not address Samuel's argument that the admission of the statements improperly tainted his conviction on the abduction and interference with custody charges. For the same reason, we do not address the State's argument that the admission of Tisha's statements was harmless error

(continued...)

The decision of the court of appeals is reversed.

¶ 48 WILLIAM A. BABLITCH, J. (dissenting). I agree with the majority's standard which requires the suppression of witnesses' statements when they are coerced through egregious police misconduct such that the statements are rendered unreliable as a matter of law, while considering the totality of the circumstances. Majority op. at ¶ 46.

¶ 49 However, it is impossible for me to reconcile the enunciated standard with the failure of the majority to remand given the totality of the circumstances present. This does not strike me as a close case at all. As a result, lower courts will ask, with some degree of confusion, if these facts do not do it, what does?

¶ 50 I conclude that this case should, at the very least, be remanded. The record raises serious questions as to the interrogation methods employed during the intake conference and immediately thereafter. A determination on whether the police conduct was egregious involves matters of credibility that only a circuit judge can determine at an evidentiary hearing. Further, the circuit court must examine the totality of the circumstances when making its determination. Accordingly, I respectfully dissent to the mandate of the majority opinion.[8]

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[7](...continued)
with regard to those two charges.

[8] This dissent did not "overlook," as stated in the majority opinion's response to the dissent, that the circuit court has "already opined that the statements were not the product of police coercion." Majority op. at ¶ 41 n. 6. The circuit court issued that
(continued...)

¶ 51 The following sequence of events is telling. On March 10, 1997, Tisha's baby is born. On March 12, 1997, the baby is taken from Tisha and placed in a foster home after Tisha repeatedly refuses to "cooperate" with the police. The next day, Tisha "cooperates" with the police by answering questions that implicate Samuel with respect to her sexual relationship with Samuel. Tisha's baby is returned to her on March 14, 1997.

¶ 52 No one denies that Tisha was told she must cooperate with the police. But cooperate how? Was it reasonable for Tisha to believe that she had to implicate Samuel or lose her baby forever? The circuit court never reached this determination. The circuit court merely determined that Samuel had no standing to raise an objection to the admission of Tisha's statement. At the very least, this case should go back for an evidentiary hearing following the procedural standards adopted by the majority from *State v. Velez,* 224 Wis.2d 1, 589 N.W.2d 9 (1999). *See* majority op. at ¶¶ 33-39.

¶ 53 There is more in this record, none of which has been challenged, to support my view that Samuel has met his burden in producing evidence to show egregious conduct sufficient to force an evidentiary hearing. In particular, David Keck, Tisha's attorney, testified that it was his personal impression that Tisha had to give a statement to police regarding the unlawful sexual relationship with Samuel in order to get her baby back. In addition, Peter L., Tisha's father, testified that he spoke with a sexual abuse investigator with the Department of Social Services and was told that the police needed

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[8](...continued)
opinion without the benefit of the new standard enunciated in the majority opinion. The circuit court could hardly apply a standard that was not even in existence at the time it so opined.

to know where and when Tisha and Samuel had sex. Peter gave this information to Tisha. Finally, Catherine Steltzer, Peter's girlfriend, testified that she was told they would consider giving the baby to Tisha if she cooperated. It was her impression that the baby was being used as a pawn and that this was blackmail.

¶ 54 If in fact Tisha was threatened with the loss of her baby unless she confessed to an unlawful sexual relationship with Samuel, such threats, implicit or explicit, constitute egregious police conduct. This record contains much evidence, none of it challenged, that leads to that conclusion. I would send it back for the circuit court's determination of the facts and conclusions.

¶ 55 I therefore respectfully dissent.

APPENDIX B

STATE OF WISCONSIN
COURT OF APPEALS

Case No. 99-2587-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STANLEY A. SAMUEL,

Defendant-Appellant.

December 27, 2000

APPEAL from a judgment and an order of the circuit court for Winnebago County: THOMAS S. WILLIAMS, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before BROWN, P.J., NETTESHEIM and SNYDER, JJ.

¶ 1 BROWN, P.J. This is a case where the State introduced into its case-in-chief a prior statement of a hostile prosecution witness who then claimed that the statement was a product of government coercion. She asserted that she was compelled to tell a lie in order to implicate the defendant, Stanley A. Samuel, as the perpetrator of a second-degree sexual assault upon her. The issue is whether Samuel had standing to object to the admission of that prior statement on grounds that the witness's statement was coerced. We conclude that he did and thus reverse the trial court's order to the contrary. Our decision necessitates a reversal of all Samuel's convictions, at

least for the time being, for reasons we will explain in the opinion. We remand with specific directions which we will also detail. Samuel also raises sufficiency of the evidence issues relating to the interference with child custody and abduction convictions, but we hold the evidence was sufficient.

¶ 2 Samuel was convicted of the following charges: interfering with child custody contrary to Wis.Stat. § 948.31(2) (1997-98),[1] abducting another's child contrary to Wis.Stat. § 948.30(1)(a) and second-degree sexual assault of a child contrary to Wis.Stat. § 948.02(2), all as a repeat offender. The convictions grow out of the following facts: On January 26, 1996, Tisha L., age fifteen at the time, left Oshkosh in a car driven by Samuel, age forty-six at the time. The pair first traveled to Milwaukee for a few weeks and then left Wisconsin until March 9, 1997, when police in Missouri stopped them. They were both then returned to Wisconsin where Tisha gave birth to a daughter on March 10, 1997. Samuel is the father of the child.

WITNESS'S ALLEGEDLY INVOLUNTARY STATEMENT

¶ 3 We will only relate those facts necessary to the first issue at this point. The facts relating to the other two convictions will be discussed later. Two days after the birth of Tisha's daughter, March 12, 1997, a nonsecure detention hearing was held. At that hearing, Tisha's father, Peter, was given custody of Tisha and the Winnebago County Department of Social Services was given custody of her child.

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[1] All references to the Wisconsin Statutes are to the 1997-98 version.

¶ 4 On the same day, an intake conference took place, the purpose of which was to determine where the baby should be temporarily placed pending a March 15 hearing to determine permanent placement. An intake worker, the corporation counsel, a social worker and Tisha's attorney were present during the entire conference. Peter, his girlfriend Catherine and a police officer were in attendance during the latter half of this conference. Tisha did not receive temporary placement at this conference. It is at this conference where Tisha claims that the police and the government employees threatened her with the loss of her baby unless she helped them prosecute Samuel. Tisha claims that to get her baby, she lied to the police and told them what they wanted to hear--namely, that she and Samuel had sex while in Wisconsin. Samuel brought a motion to suppress the statement prior to trial and the court held an evidentiary hearing on the matter. Following is an account of the evidence taken at that hearing.

¶ 5 Tisha testified that during the intake conference, she was asked a number of questions, among them being who she had sex with, when and where. She refused to answer these questions because she felt that they were irrelevant to the issue of her baby's placement. Tisha claimed that in response, she was told "countless times" that if she did not cooperate, she would not get her child back. Catherine testified that someone at the intake conference told her "if they saw some cooperation, they would consider giving the baby back [to Tisha]." Tisha testified that she was told she had to give a statement to the police before the March 15 hearing to determine the baby's permanent placement.

¶ 6 Tisha further testified that although she was never directly told "to give Samuel up, get him in trouble," she was indirectly told to do so. Tisha stated that she thought she was not given temporary custody of her baby at the conclusion of the intake conference precisely

because she refused to tell the authorities what they wanted to hear. But after discussing the situation with her father, Tisha decided that she would "say whatever they deemed worthy ... what they thought happened, or just whatever they wanted" in order to get her child back.

¶ 7 Tisha then testified that as instructed, she made an appointment to speak with the police officer the next day, March 13. At this conference, in which the social worker was also in attendance, Tisha told the officer that she had sex with Samuel in Wisconsin before she was sixteen. Tisha went on to testify, however, that she and Samuel actually did not have sex for the first time until April 1996 when they were no longer in Wisconsin. She told the court that she was coerced into making a false statement because she thought that this is what she needed to do to get her baby back.

¶ 8 Peter also testified at the motion to suppress hearing. He said that he spoke to the social worker after the intake hearing. The social worker told him that the police needed to know where and when Tisha and Samuel had sex. He testified that he conveyed this information to Tisha. Peter acknowledged that, during the intake conference itself, he did not hear any direct threats made by the authorities if Tisha did not cooperate. The social worker also testified and denied telling Peter that the police needed to know where and when Tisha and Samuel had sex.

¶ 9 After hearing the evidence, the trial court declined to decide whether Tisha's statement had been coerced. Instead, the trial court ruled that Samuel had no standing to raise the issue. The trial court reasoned that the exclusionary rule allowing for suppression of involuntary statements before trial is a prophylactic rule designed to deter Fifth Amendment concerns where it has been alleged that the

defendant has personally been a victim of illegal government activity. Since it was not the defendant's statement that was allegedly coerced, the trial court concluded that Samuel could not assert the constitutional rights of others. The trial court further reasoned that when a witness claims that a prior statement was the result of coercion by the police, it is up to the jury or finder of fact in each individual case to decide whether the witness's claim is credible.

¶ 10 At trial, the State called Tisha to the witness stand in its case-in-chief. After Tisha denied that she and Samuel had sex in Wisconsin while she was fifteen years old, the State submitted into evidence her prior statement. When asked about the statement, Tisha denied that it was true and claimed that it was coerced. Samuel called a number of witnesses who testified regarding the circumstances of the allegedly coerced statement. The jury found Samuel guilty, inter alia, of second-degree sexual assault, which includes sexual intercourse with a minor under the age of sixteen. Samuel then appealed and made the trial court's ruling on the motion to suppress one of the issues in his appeal.

¶ 11 In his brief to this court, Samuel claimed that the trial court had given too narrow an interpretation of the Fifth Amendment. He agreed that individuals who are not personally the victims of illegal government activity generally cannot assert the constitutional rights of others. However, he argued that a violation of another's rights may rise to the level of a violation of a defendant's rights to a fair trial when the government seeks a conviction through the use of evidence obtained by coercion. Thus, a defendant has standing to assert a Fifth Amendment right to due process as a valid objection to the introduction of statements extracted from a nondefendant by coercion or other inquisitional tactics. The issue, he maintained, is whether the government's investigatory methods would result in a

fundamentally unfair trial. He argued that such motions are also viable under the Fourteenth Amendment's Due Process Clause. He maintained that he has standing to raise Tisha's claim of having given a coerced statement because, as a matter of the truth-finding process of American jurisprudence, all coerced statements are inherently unreliable. This is so whether the statements are extracted from a defendant or whether they come from the mouth of a witness. He contended that the duty of the court is to keep out of evidence all statements obtained by illegal means so as to avoid infecting the process which, he maintained, is particularly a Fourteenth Amendment concern.

¶ 12 In its response brief, the State asserted that standing was "questionable," but maintained that we did not have to reach the issue because, here, it was clear that Tisha's statement was not coerced. The State pointed out that nowhere is there any direct evidence that the police or its agents told Tisha she would not get her baby unless she gave a statement saying that Samuel had sex with her in Wisconsin when she was fifteen. The State argued that Tisha's "beliefs" as to what she needed to do to get her baby back were conclusions that she alone drew. Finally, the State argued that even if we did not accept the State's view of the facts, since the Fourteenth Amendment speaks to due process, Samuel's due process was not denied to him because he had the opportunity to bring out the circumstances surrounding Tisha's statement to the jury.

¶ 13 We heard oral argument on the issue. At oral argument, Samuel maintained the same position that he had in his brief. The State's position shifted ever so slightly. Whereas, before, the State maintained that standing was "questionable," it now conceded that Samuel had standing to raise the issue as a Fourteenth Amendment concern and that it could be heard under the rubric of prophylactic

suppression of evidence before trial. However, the concession was based on one condition--a major one. Only if the statement was the product of "torture or extreme coercion" was a prophylactic remedy indicated. In cases where there was perhaps evidence of some lesser degree of coercion, however, the State continued to maintain that a defendant had no standing to raise the issue as a "suppression" motion. Rather, much like the trial court had ruled, if the witness complained that the statement made was untruthful because it had been coerced, the jury or the fact finder had the responsibility of determining the truth. So, in this case, where Tisha's complaint of coercion could not be considered to be the product of "torture" or "extreme" coercion, Samuel could make it an issue, but he had to make it an issue with the jury. Since Samuel did make it an issue with the jury and the jury still found him guilty of second-degree sexual assault, his claim had to fail.

¶ 14 This is an issue of first impression in Wisconsin, but not in other jurisdictions. We begin our discussion with the approach adopted by the Tenth Circuit. In two cases, *Clanton v. Cooper*, 129 F.3d 1147, 1157- 58 (10th Cir.1997), and *United States v. Gonzales*, 164 F.3d 1285, 1289 (10th Cir.1999), the judges of that circuit laid down the rule in its jurisdiction. The courts first observed that the issue was not whether the defendant's Fifth Amendment rights had been violated. *See Gonzales*, 164 F.3d at 1289. They wrote that, obviously, the manner in which the statement was obtained does no violence to the defendant, but to the witness. *See id.* Therefore, the courts reasoned that it was not the manner in which the statement was obtained that was at issue. *See id.* Rather, it was the fact that the State was actually going to *use* the allegedly coerced statement in a trial that was at issue. *See id.* The judges of the Tenth Circuit reasoned that if it is true that coerced statements are inherently unreliable, as the law has so found, then it was a violation of due

process for the State to be using inherently unreliable evidence to make its case. *See Clanton*, 129 F.3d at 1157-58. In the view of the Tenth Circuit, the issue at stake was the integrity of our judicial system. *See id.* The judges thought that integrity would be undermined if the State were allowed to build its case against a defendant using evidence obtained through illegal police methods. *See id.*

¶ 15 Connecting the use of illegal police methods to the Fourteenth Amendment is not a new proposition. As far back as *Jackson v. Denno*, 378 U.S. 368, 385-86, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), the United States Supreme Court wrote:

> It is now inescapably clear that the *Fourteenth Amendment* forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the "strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will" ... and because of the "deep-rooted feeling that the police must obey the law while enforcing the law ...."

Id. (citations omitted) (emphasis added).

¶ 16 Of course, the *Jackson* case involved a defendant's allegedly coerced confession, not a witness's allegedly coerced statement. But *Jackson* nonetheless demonstrates that the Fourteenth Amendment is a consideration in deciding whether to employ the prophylactic rule of suppression as a remedy for police conduct which crosses the line. *See id.* The Tenth Circuit judges so noted. *See Clanton*, 129 F.3d at 1157-58.

¶ 17 Having decided that the Fourteenth Amendment forbids the use of coerced confessions, the next step for the Tenth Circuit judges was to decide whether the Fourteenth Amendment also forbids the use of coerced statements of witnesses. The *Clanton* court wrote that a coerced witness's statement is just as unreliable as a coerced defendant's statement. *See id.* at 1158. Moreover, the government's use of coerced statements to make its case is just as antithetical to our notions of decency and fair play when it is a witness's statement as when it is a defendant's statement. In either case, use of the statement infects the integrity of the judicial system. The *Clanton* court stated that "methods offensive when used against an accused do not magically become any less so when exerted against a witness." *Id.* (citation omitted).

¶ 18 Thus far, we doubt that the State would argue with any part of the Tenth Circuit's rationale we have recited. Indeed, as we have stated above, the State concedes that the defendant has a Fourteenth Amendment due process right to ask that a witness's statement be suppressed as a prophylactic measure on grounds that it was coerced. And other federal circuits agree.

¶ 19 But, as we have previously stated, the State departs from the Tenth Circuit in one crucial aspect. The State contends that the right to a prophylactic remedy when a nondefendant witness is involved exists only if the coercion used was "torture" or was otherwise "extreme." The State seems to assert that there is a different standard for coercion when a nondefendant is involved than with a defendant. The State relies on these jurisdictions. *See United States v. Merkt*, 764 F.2d 266, 273-75 (5th Cir.1985) (A defendant has standing to object to the admission of a coerced witness's statement, but suppression is not appropriate as a prophylactic measure where the coercion is not so egregious.); *United States v. Chiavola*, 744 F.2d

1271, 1273 (7th Cir.1984) (Due process is implicated when the government seeks a conviction through the use of evidence obtained by extreme coercion or torture.); *Bradford v. Johnson*, 354 F.Supp. 1331 (E.D.Mich.1972) (Under normal circumstances, credibility is an issue a jury can determine; however, the Fourteenth Amendment is violated when a witness's confession obtained by torture is admitted against the defendant.), *aff'd*, 476 F.2d 66 (6th Cir.1973).

¶ 20 We respectfully disagree with those courts. Our response to those courts is exactly like the response of the *Gonzales* court. We quote it in full:

> We reject the government's argument that a non-defendant witness' statement that incriminates a defendant is subject to suppression only if the statement was the product of torture or extreme coercion beyond the level of coercion required for suppression of a defendant's own confession. As we noted in *Clanton*, "methods offensive when used against an accused do not magically become any less so when exerted against a witness...." Consequently, the standard for determining whether a statement was voluntary is the same whether we are dealing with a defendant or a third party witness.

Gonzales, 164 F.3d at 1289 n. 1 (citation omitted).

¶ 21 Thus, we hold that the standard for determining whether a nondefendant witness's statement was voluntary is the same test that we use when determining whether a defendant's statement is voluntary. That test is spelled out in *State v. Clappes*, 136 Wis.2d 222, 401 N.W.2d 759 (1987). There, the court wrote about the factors which must be considered. We recite them here.

> The relevant personal characteristics of the confessor include his age, his education and intelligence, his physical and emotional condition, and his prior experience with the police. These factors must be balanced against the police pressures and tactics which have been used to induce the admission, such as the length of the interrogation, any delay in arraignment, the general conditions under which the confessions took place, any excessive physical or psychological pressure brought to bear on the declarant, any inducements, threats, methods or strategies utilized by the police to compel a response, and whether the individual was informed of his right to counsel and right against self- incrimination.

Id. at 236-37, 401 N.W.2d 759 (citations omitted).

¶ 22 We also think it is appropriate to cite *Lynumn v. Illinois*, 372 U.S. 528, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963). In that case, an oral confession was made by the defendant only after police told her that state aid would be cut off and her children would be taken from her unless she confessed. *See id.* at 533, 83 S.Ct. 917. The United States Supreme Court held that this was a coerced statement in violation of due process. *See id.* at 537, 83 S.Ct. 917. We also cite *United States v. Tingle*, 658 F.2d 1332 (9th Cir.1981). There, the court wrote:

> We think it clear that the purpose and objective of the interrogation was to cause Tingle to fear that, if she failed to cooperate, she would not see her young child for a long time. We think it equally clear that such would be the conclusion which Tingle could reasonably be expected to draw from the agent's use of this technique. The relationship between parent and child embodies a primordial and fundamental value of our society. When law enforcement officers deliberately prey upon the maternal instinct

> and inculcate fear in a mother that she will not see her child in order to elicit "cooperation" they exert the "improper influence" proscribed by *Malloy [v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964)]

Tingle, 658 F.2d at 1336.

¶ 23 We conclude that the trial court's order holding that Samuel had no standing to move to suppress Tisha's statement is in error. We reverse the order. As a consequence, we must also reverse the conviction for second- degree sexual assault. We remand this case to the trial court for a hearing to determine if Tisha's statement was voluntary. We realize there has already been an evidentiary hearing to determine this issue. And we also realize that the trial court did not make a finding at that time because of its decision regarding standing. An easy course of action would be to remand with directions that the trial court review the record and make findings of fact based on the cold record. But we will not order that. The trial judge who originally heard the motion is now retired and a new judge must be afforded the opportunity to hear and see the witnesses and judge their demeanor and credibility. We therefore remand with directions that there be a new fact- finding hearing to determine whether Tisha's statement was voluntary.

¶ 24 The trial court shall use the same factors that are outlined in *Clappes*. Since one of those factors is any "threats, methods or strategies" used by the government to compel a response, the trial court must also be mindful of *Lynumn* and *Tingle*. The key to whether *Lynumn* and *Tingle* should be applied will be whether the trial court finds that the cooperation required of Tisha included giving a coerced statement that Samuel had sex with her in Wisconsin when she was fifteen. If the trial court so finds, then it shall order a new

trial on the second-degree sexual assault charge and the statement will not be admitted at this trial. If the trial court finds that the government did not compel Tisha to inculpate Samuel in return for custody of the baby, it shall reenter the judgment of conviction for second-degree sexual assault.

¶ 25 Before we leave this particular issue, we address whether this error should also result in the reversal of Samuel's convictions for interfering with parental custody and for abduction. His claim is that the statement so tainted Tisha's credibility with the jury that the jury could very well have disbelieved her testimony relating to these other two charges as well as the sexual assault charges. We agree. We will explain why this is so in the following passages.

INTERFERENCE WITH CUSTODY

¶ 26 Samuel argues that there was insufficient evidence to convict him of interfering with child custody. Evidence to support a conviction is insufficient if, considering the evidence in a light most favorable to the verdict, no reasonable jury could be convinced that the defendant was guilty beyond a reasonable doubt. *See State v. Koller*, 87 Wis.2d 253, 266, 274 N.W.2d 651 (1979).

¶ 27 The Interfering with Custody statute explains three different ways in which a person interferes with custody of the parents: causing a child to leave, taking a child away, or withholding a child for more than twelve hours. *See* wis. Stat. § 948.31(2). Here, Samuel was charged under the "causing a child to leave" alternative, but the instruction submitted to the jury was the "taking the child away" alternative. A conviction can only stand if the evidence at trial was sufficient to convict on the theory presented to the jury. *See State v. Wulff*, 207 Wis.2d 143, 152, 557 N.W.2d 813 (1997).

Thus, our review is limited to determining whether Samuel took Tisha away from her parent.

¶ 28 The evidence is that Tisha was living with her mother. The mother testified that on January 29, 1996, she came home between 5:00 and 5:30 a.m., fell asleep for an hour, and then awoke at 6:30 a.m. to see if the children were up for school. The mother testified that Tisha was not in her room and several things were missing, including a blanket and a suitcase. When Tisha did not come home that evening, the mother called the police. The mother testified that she did not see Tisha again until March 1997, and that she did not give Samuel permission or consent to take Tisha from her.

¶ 29 Tisha testified that her mother had kicked her out of the house. Tisha further testified that she and Samuel agreed that he would come and pick her up and she would leave with him, which she did. Tisha's mother denied that she kicked Tisha out of the house or told Tisha that she had been kicked out of the house.

¶ 30 Interference with child custody requires evidence that a person either caused a child to leave, took the child away or withheld the child for more than twelve hours "without the consent of the parents." Samuel's claim at trial was that since Tisha was kicked out of the house, her leaving was not without the consent of the mother. Tisha's testimony supported that theory, but the jury--by finding Samuel guilty of interfering with child custody--obviously rejected Tisha's account in favor of the mother's. The bottom line here is that Tisha's prior inconsistent statement-- the statement she claims was coerced--may have affected her credibility before the jury. The jury heard her tell one story to the police and a different story in court. If the trial court eventually rules that the prior statement was in fact coerced and is inadmissible at a future trial for sexual assault, then

the interfering with child custody conviction must be reversed and a new trial ordered as well. This is because Tisha's credibility with respect to the interfering charge could well have been held in low esteem by the jury after hearing the conflict between her prior statement and her statement in court. Consequently, for this reason, the interference with child custody charge is reversed. It may be reentered if the trial court finds that the prior statement was not the product of illegal police coercion.

¶ 31 But we still have the issue of whether the interfering with child custody conviction must be reversed because the evidence is insufficient. That is a different issue and we now address it.

¶ 32 Samuel's argument begins with a request that we look to the complete statute relating to interference with child custody. When we do that, he believes we will see that each of the three alternatives in the statute speaks to different acts. Samuel terms the difference as being the "moving force" at work within the three alternatives. The way Samuel sees it, the first alternative, "takes away," involves the situation in which the defendant takes a child away from his or her home or parents. The moving force under that provision, as demonstrated by the verb "takes," is the defendant.

¶ 33 The second alternative is where the defendant "causes the child to leave." Here, the child is not "taken" but leaves on her or his own accord, although the defendant contributed to the decision by persuasion or otherwise. The use of the verb "leave" demonstrates a focus on the willful act of the child.

¶ 34 According to Samuel, the jury must have found that Tisha willfully left of her own accord without the consent of her mother. Samuel is bound by that finding. Nonetheless, Samuel contends that

the important point here is that it was Tisha's voluntary decision to leave. Therefore, she was not "taken" by Samuel. Samuel may have "contributed" to her decision to leave, but the "cause to leave" alternative was not given to the jury. Samuel belittles the State's argument that the "takes away" theory requires only that she was physically present in the home when Samuel arrived and took her. In Samuel's view, Tisha had already left the home the minute she was out the door. Therefore, Tisha had already severed herself from the custody of her mother independent of any action by Samuel. Her driving off with Samuel occurred after she independently severed custody from her mother. Therefore, Samuel was not involved in any "taking away" from custody.

¶ 35 We do not buy Samuel's argument. What Samuel is really asking us to do is to hold that Tisha's objective act in physically and mentally closing the door to her home defines the point at which custody was actually severed. His statutory construction analysis puts an element into the "takes away" alternative that does not exist--that a person may be guilty of taking away a child only if the child has not willfully decided to leave. We will not add words to the statute that are not there.

¶ 36 It makes more sense to construe the statute in the manner suggested by the State. That analysis is as follows: The term "takes away" is not a technical term. The word "take" is defined as "remove." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2330 (1993). "Away" is defined as "from one's possession." *Id.* at 152. In the context of wis. Stat. § 948.31(2), which uses the phrase "takes a child away ... from the child's parents," the "takes away" refers to the defendant removing the child from the parents' possession. "Takes away" or removes from one's possession suggests some sort of "physical manipulation" or

"physical removal" of the child from the parents.

¶ 37 The "cause to leave" alternative also involves nontechnical words. "Cause" is defined as "brings about an effect or ... produces or calls forth a resultant action or state." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 356 (1993). "Leave" is defined as "desert," "abandon" and "go away or depart from." *Id.* at 1287. Thus, "causing a child to leave" his or her parents means being responsible for or to bring about a child abandoning, departing or going away from his or her parents. "Causes to leave" suggests some sort of mental manipulation of the child, as opposed to physical manipulation. A defendant causes a child to leave his or her parents by doing things to persuade the child to leave. For example, if a defendant lives in California, meets a girl over the internet and encourages her to come to California so she can become a model, and if the girl does go to California because of the defendant's persuasion, the defendant has caused her to leave her parents.

¶ 38 We adopt the State's construction. So long as the defendant has had a hand in physically removing the child from the parents' possession, the defendant has taken the child away. This physical removal can be accomplished by driving the child away in a vehicle. The act of asportation means more than just shutting the door behind you. Driving away in a vehicle is part of the continuous act of physical removal. Samuel was directly involved in facilitating Tisha's physical removal by driving her away from the house and from the area. The evidence is sufficient.

ABDUCTION

¶ 39 Samuel also contends that the evidence was insufficient for the jury to convict him of abduction pursuant to wis. Stat. § 948.30(1)(a).

The statute reads that any person who, for any unlawful purpose, "takes a child who is not his or her own by birth or adoption from the child's home or the custody of his or her parent" is guilty of abduction. Samuel makes the same argument with respect to this statute that he made regarding the interference with child custody statute. He says that he did not physically take Tisha from her mother; Tisha left of her own accord or was thrown out. Under either scenario, the physical custody was at an end by the time Samuel became involved. For the same reasons that we rejected Samuel's argument relating to the interference conviction, we reject this one. Samuel was directly involved in Tisha leaving her mother's home and was directly involved in facilitating the removal by physically driving her away from the house and the area. As a result, Samuel removed Tisha from her mother's control, and therefore, took Tisha from her mother's custody. The evidence is sufficient to sustain a conviction for abduction.

¶ 40 However, for the same reasons that we are constrained to reverse for the moment, the interference with child custody conviction, we must also reverse and remand this abduction conviction. Samuel's defense at trial was that he could not have abducted Tisha from the mother's custody if the mother had already voluntarily relinquished custody. As we pointed out before, while Tisha claimed she was kicked out, the mother claimed that Tisha left without consent. The jury obviously believed the mother. It could be that the jury's assessment of Tisha's credibility relating to the abduction charge was affected by the admission of Tisha's prior inconsistent statement implicating Samuel in having had sex with her in Wisconsin when she was fifteen. Thus, whether the abduction conviction is reentered will depend upon the trial court's factual findings on remand.

CLAIM OF DENIAL OF DUE PROCESS AT SENTENCING

¶ 41 Finally, Samuel contends that he was denied due process at sentencing because the court considered psychological evidence contained in a sealed document for the CHIPS proceeding concerning Tisha. He complains that he was not a party to the proceeding, had no access to the report and therefore had no way to rebut it. He contends that the report prejudiced him at sentencing because the court commented on how Samuel's actions had resulted in Tisha requiring long-term counseling and perhaps treatment in the future. The State argues waiver and Samuel responds that waiver is inappropriate because he had no idea that the evidence was germane to the sentencing until the trial court began its remarks while imposing sentence. He also argues that because the State did not argue waiver at the postconviction stage, it is prohibited from raising it now.

¶ 42 We accept the State's waiver argument. First, just because the trial court was in its "imposing sentence" phase, that did not prevent Samuel from objecting. He had as much right to object then as at any other time during the proceeding. Second, while we acknowledge that there are times when we will reject the State's waiver argument if it was not made at the postconviction stage, there is no iron-clad rule. A waiver analysis depends, in part, not on whether an issue was raised at the postconviction stage, but on whether the trial court could have taken some type of preventive action had the issue been timely raised. We agree with the State that had the issue been timely raised before the sentencing court, a solution could likely have been arrived at.

¶ 43 A waiver assessment also depends upon whether we should reach an issue because it is important to the integrity of the result.

Here, we are convinced that the issue Samuel raises is of little consequence. As the State points out, evidence of how Tisha's experience has affected her was not really "secret" evidence. The trial court told Samuel that the report said Tisha had counseling needs and showed disrespect for authority. This was not news to Samuel. He already had ample evidence of Tisha's disrespect for authority. Had Samuel disagreed with the assessment that Tisha needed counseling because of this, he could easily have voiced his disagreement when the trial court referred to it. The issue is waived.

Judgment affirmed in part; reversed in part and cause remanded with directions.

APPENDIX C

STATE OF WISCONSIN
CIRCUIT COURT BRANCH III WINNEBAGO COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 97-CF-109

STANLEY A. SAMUEL,

Defendant.

ORAL DECISION ON POST-CONVICTION MOTION -- AFFIRMING SUPPRESSION OF WITNESS STATEMENT
September 30, 1999

THE COURT: . . . As to Argument No. 3, as to the coerced statements by Ms. L[.] or what's been alleged to be coerced and with regard to their admissibility, certainly there have been a number of cases that have been cited that are from the federal courts.

None of those are particularly enlightening given the fact that those did deal with co-defendants-- and in this case, in all honesty, the Court wouldn't be able to even find coercion. This is a totally different type of circumstance than say a witness comes in and she's a mother and the police say if you don't tell us what we want to hear, we're taking your child.

This is a case in which the mother was a minor on the run, who gave birth while on the run and was subsequently returned. It was her acts for which the child was initially taken into custody and

certainly that is distinguishable from the types of cases that have been cited here today.

There, again, in all of the meetings with the police, her attorney was present, her father was present-- and again, it was her acts beforehand which led to originally there being an issue as to whether the child would remain with her or not. And in light of the fact as well that she was not told what to say but just to cooperate here, doesn't to this court say that it's been inferred that she has to say what they want her to say or she won't get her child back.

And besides that, again, there's nothing other than these federal cases that this court believes aren't [sic] really distinguishable that would lead this court to believe that a due process issue has even really been raised for that analysis.

Given the fact that the witness is just that, a witness, not a co-defendant, not a defendant, her statements are certainly subject to cross-examination at a trial and any inconsistent statements that may have been there. And certainly, that's something for which the jury can make their determination as to the reliability of those statements.

And further, in this case, certainly there was sufficient corroboration from other witnesses to support the reliability of the statements that were made to the officers. And in this case, again, the Court can't find that there has been any error here at all in that there was sufficient corroboration at [sic] well.

APPENDIX D

STATE OF WISCONSIN
CIRCUIT COURT BRANCH III WINNEBAGO COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 97-CF-109

STANLEY A. SAMUEL,

Defendant.

DECISION ON MOTIONS

Defendant has moved to suppress statements of Tisha L[.] which he alleges were obtained through threats and coercion. An evidentiary hearing was held as to the circumstances of the making of the statements, which were recanted by Tisha at the preliminary examination.

In support of his argument, he cites cases dealing with a [sic] confessions or statements of a defendant, on the basis that the defendant has a right against self-incrimination which must be voluntarily waived, and coercion renders the statement involuntary. The purpose of suppression is to deter police misconduct.

Defendant argues that the rules that apply to coercion of a defendant must also apply to witnesses or alleged victims. The privilege against self-incrimination is personal to the defendant, and is unrelated to witnesses or alleged victims.

A trial is a search for truth, and the jury is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. Exceptions are made where a threshold finding is made

by the court, since presentation to the jury would expose them to evidence which might be otherwise barred by constitutional protections. See discussion in State ex re. Goodchild v. Burke, 27 Wis.2d 244, 262-66 (1965).

Tisha has clearly indicated her desire to continue a close relationship with the defendant, and may properly be expected to be a witness hostile to the prosecution. The jury must determine her credibility and the weight to be given to her testimony, and should have all the information, including the alleged coercive conduct, needed to make those determinations.

Where there is no showing that Tisha's constitutional rights were violated, to have the court make the decision as to whether she was coerced and what effect that has had on her testimony would usurp the jury's function.

I conclude that, if otherwise admissible, Tisha's statements cannot be excluded soley [sic] on the ground that they were coerced, and deny defendant's motion to suppress them.